4-7-2014

State v. Arrotta Respondent's Brief Dckt. 41632

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff/Appellant, Supreme Court No. 41632
Latah Co. Case No. CR-12-4156

v.

DEREK M. ARROTTA

Defendant/Respondent

RESPONDENT'S BRIEF

Appeal from the District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah

Honorable John C. Judge, Magistrate Judge
Honorable John R. Stegner, District Judge

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A. NATURE OF THE CASE

The state appeals from the District Court ruling affirming the magistrate's order suppressing evidence of the results of a blood alcohol test drawn without a warrant.

B. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

The state charged Derek Michael Arrotta with misdemeanor DUI. (R., p. 9) Mr. Arrotta filed a motion to suppress evidence obtained as a result of a blood draw. (R., pp. 37-41) At the motion to suppress the magistrate made findings of fact including: Trooper Baldwin had probable cause to arrest Mr. Arrotta. (Tr. p. 112, Ls. 1-6) Mr. Arrotta was very clear that he refused the evidentiary testing including breath and blood test. (Tr. p. 112, Ls. 16-25) Trooper Baldwin told Mr. Arrotta that he must provide a blood draw regardless of his refusal. (Tr. p. 113, Ls. 3-8) Submitting to the authority of the state does not constitute legitimate consent. (Tr. p. 113, Ls. 3-8) There was no exigency and that was acknowledged by the State. (Tr. p. 113, Ls. 9-11) The state maintains that the state relies on Idaho's implied consent law to support the assertion of consent. (Tr. p. 113, Ls. 17-24) The magistrate held that: "*Schneckloth v. Bustamonte*, which is not an implied consent case……It's just a totality of the circumstances case…..to determine if consent is legitimate or not. (Tr. p. 115, Ls. 10-23) "I do not believe that consent implied by statute is sufficient to erase….. a Fourth Amendment right to be free from unreasonable search and seizure." (Tr. p. 115-116, Ls. 1-1) The court held that a categorical exemption for exigency and a categorical exception under implied consent requires a case by case analysis to establish an

exigency exception. (Tr. p. 117, Ln. 1-18) The government must obtain a warrant absent an exception of an exigency. (Tr. p. 117, Ls. 14-18) The court suppressed the results of the blood draw. (Tr. p. 121)

The state appealed to the district court. (R. pp. 67-69) The District Court held: "Judge Judge found that Trooper Baldwin had probable cause to stop Arrotta for traffic infraction. He found there were no exigent circumstances, that there was no express consent, nor were there any exceptions to the warrant requirement that would support the warrantless search." (R. 110 citing Tr. p 111:19-112:10, 113:7-11)

Judge John R. Stegner in his opinion noted that Judge Judge found that *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), cast doubt on Idaho's implied consent law "sufficient to erase.....a Fourth Amendment right to be free from unreasonable search and seizures." (R. 110 citing Tr. p. 116:1-5) Judge John R. Stegner noted that Judge Judge stated he could not make a "logical distinction....between a categorical per se exception for exigency in [DUI] cases and a categorical exception under implied consent." (R. 110-111 citing Tr. p. 117:7-10) Therefore, the state was required to obtain a warrant for a blood draw in this case, and had not done so, making the invasive search unreasonable. (R. 111)

Judge Stegner then went on to note that the Implied Consent statute authorizes the imposition of a $250 civil penalty and driver's license suspension for one year for refusal. I.C. § 18-8002. The court discussed the holdings in *State v. Woolery*, 116 Idaho 368, 371, 775 P.2d 1210, 1213 (1980). (R. 112) The court also noted that drivers were not allowed to refuse to take a blood test or withdraw the consent to draw blood. (R. 113) The court found that the effect of *Woolery* and

its progeny is to make "any driver in the state of Idaho, whether protesting or not, legally subject to a blood test without any requirement to obtain a warrant. (R. 114) The court held *Woolery* was drawn into question by *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). (R. 114) The court also found the facts in Arrotta case strikingly similar to those in the *McNeely* case. (R. 114)

The court then conducted an analysis of the *McNeely* case noting the Supreme Court discussed the implied consent statutes finding that "in those drunk driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so" citing *McNeely* at 1561. (R. 115-116) The court found that *McNeely* is broader than the state "suggests: it holds that per se statutory schemes attempting to circumvent the warrant requirement altogether are prohibited." (R. 116) Judge Stegner also noted: "Regarding the State of Missouri's attempt at such a scheme, a majority of the Court wrote "Here and in its own courts, the State based its case on an insistence that a driver who declines to submit to testing after being arrested for driving under the influence of alcohol is always subject to a nonconsensual blood test without any precondition for a warrant. That is incorrect." *McNeely* at 1568. (Sotomayer, J., joined by Scalia, Kennedy, Ginsburg, and Ragen, JJ.) (R. 116)

The district court went on to hold that *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973) requires that voluntariness of consent must be based upon the totality of the circumstances finding no "single controlling criterion" exists to establish a per se consent exception but that there must always be a "careful scrutiny of all the surrounding circumstances." *Bustamonte* at 226. (R. 116-117)

Judge Stegner found: "To adopt the scheme proposed by the State threatens to make the Fourth Amendment and Article I § 17 nullities in Idaho. Every driver, indeed any person in physical control of a vehicle, would be potentially subject to the invasion of their bodily integrity by a hypodermic needle upon a showing of reasonable suspicion.....precluding any driver from being secure in his person against a blood draw, notwithstanding, persistent refusals." (R. 117-118) The Legislature (or the courts) could just as easily imply irrevocable consent to a warrantless search of a car, simply as a prerequisite to driving on a public road. Or they could imply irrevocable consent to religious instruction at schools because parents enrolled their children in the public school system. The irrevocable implied consent could be used to circumvent virtually all constitutional protections. (R. 118) Then Judge Stegner upheld the decision of Judge Judge. (R. 118-119) The state appealed. (R. 121-24)

II. STANDARD ON REVIEW

The appellate court applies a bifurcated standard accepting the factual findings unless clearly erroneous. The court will freely review the application of the constitutional principle to the facts found. *State v. Purdum*, 147 Idaho 206, 207 P.3d 182, 183 (2009)

In conducting the review the District Court found that the United States Supreme Court in *Missouri v. McNeely*, 133 S. Ct. 1552, 1568 (2013) held that per se or categorical exceptions to a warrant requirement were improper.

III. ISSUES ON APPEAL

A. Did the state violate defendant's Fourth Amendment and Article I § 17 right to be free from an unreasonable search and seizure by withdrawing defendant's blood over his objection and in the absence of exigent circumstances?

B. May a defendant arrested for driving under the influence revoke his implied consent under I.C. 18-8004?

C. May the state of Idaho, after *Missouri v. McNeely*, condition the privilege of driving upon an individual's "Implied Consent" to a warrantless blood draw?

III. ARGUMENT

A. The state violated the defendant's Fourth Amendment and Article I § 17 right to be free from unreasonable search and seizure by withdrawing the defendant's blood over his objection and in the absence of exigent circumstances.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches. *State v. Jaborra*, 143 Idaho 94, 97, 137 P.3d 481, 484 (Ct. App. 2006) Administration of blood alcohol testing constitutes a seizure of the person and a search within the purview of the Fourth Amendment. *State v. LeClerq*, 149 Idaho 905, 243 P.3d 1093, 1095 (Ct. App. 2010), citing *Schmerber v. California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 1833-34, 16 L.Ed.2d 908, 917-18 (1966); *State v. Diaz*, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007) A search conducted by law enforcement officers without a warrant is *per se unreasonable* unless the State shows that it fell within one of the narrowly drawn exceptions to the warrant requirement. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *State v. Dominguez,* 137

Idaho 681, 683, 52 P.3d 325, 327 (Ct.App.2002) The state has the burden of overcoming the presumption of unreasonableness:

> [t]o overcome this presumption, the State bears the burden of establishing two prerequisites. First, the State must prove that a warrantless search fell within a well-recognized exception to the warrant requirement. Second, the State must show that even if the search is permissible under an exception to the warrant requirement, it must still be reasonable in light of all of the other surrounding circumstances.

Id. (internal citations omitted). Here, there exists no valid exception to the warrant requirement. Thus, the warrantless blood draw must be suppressed.

MISSOURI V. MCNEELY

In the recent case of *Missouri v. McNeely*, a case with facts substantially similar to the case at bar, the U.S. Supreme Court ruled that the Fourth Amendment protects drivers from state compelled blood draws upon suspicion of DUI. In so doing, the Court eradicated four decades of misinterpretation and misapplication of its prior decision in *Schmerber v. California*, whereby courts across the country had held that DUI suspects possessed no constitutionally protected right to be free from compelled warrantless blood draws.

McNeely had been stopped and arrested for DUI. *Missouri v. McNeely*, 133 S. Ct. 1552, 1554, 185 L. Ed. 2d 696 (2013) Prior to his arrest, Missouri's implied consent statute had been amended to remove a motorists' statutorily granted right to refuse a blood test, instead authorizing law enforcement to obtain a warrantless blood draw after a motorist's refusal to

submit to a test.[1] Idaho's implied consent statute likewise purports to authorize law enforcement to extract blood after, or in spite of, a motorist's refusal to submit to test. *See*, I.C. 18 § 8002-8004; *see also, State v. Diaz*, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007). After his arrest, McNeely was asked to provide a breath sample. *McNeely*, 133 S. Ct. at 1554 McNeely refused. *Id.* Due to the officer's training concerning the nature of Missouri's implied consent law, he thereafter transported McNeely the hospital for a warrantless blood draw. *Id.*

McNeely argued that the Fourth Amendment prohibited the state from subjecting him to a warrantless, nonconsensual blood draw. The State of Missouri and its Amici argued to the contrary, asking the Court to put their stamp of approval upon a decades old interpretation of the its prior decision in *Schmerber v. California*, i.e. that the evanescent nature of alcohol, in and of itself, constituted exigent circumstances and therefore a per se exception to the warrant requirement:

> [t]he State contends that whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent. As a result, the State claims that so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant.

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[1] In a footnote the Missouri Supreme Court explained the history of Missouri's implied consent law:

> ... the former version of section 577.041.1 stated that if a person refused both the breath-analyzer and the blood draw test, then "none shall be given." Section 577.041.1, RSMo Supp.2008. However, that section was amended prior to Defendant's arrest by the deletion of the phrase "and none shall be given." Section 577.041.1, RSMo. Supp.2010. With the removal of that phrase, the prosecutor asserted that police officers now may "rely on the well settled principle that obtaining blood from an arrestee on probable cause without a warrant and without actual consent does not offend constitutional guarantees." The prosecutor's assertion rests on a fundamental misreading of *Schmerber*."

State v. McNeely, 358 S.W.3d 65, 68 (Mo. 2012), reh'g denied (Mar. 6, 2012), *cert. granted*, 133 S. Ct. 98, 183 L. Ed. 2d 737 (U.S. 2012) and *aff'd*, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (U.S. 2013).

Missouri v. McNeely, 133 S. Ct. 1552, 1560, 185 L. Ed. 2d 696 (2013) So the argument went, with exigency inherent in each and every DUI case, a driver who declines to submit to testing would be subject to a nonconsensual blood test without any precondition for a warrant. Such an argument was rejected by the Court:

> [h]ere and in its own courts the State based its case on an insistence that a driver who declines to submit to testing after being arrested for driving under the influence of alcohol is always subject to a nonconsensual blood test without any precondition for a warrant. That is incorrect.

Missouri v. McNeely, 133 S. Ct. 1552, 1568, 185 L. Ed. 2d 696 (2013) The Court held that exigent circumstances do not exist in each and every DUI case, but rather they must be proven by the state and determined on a case by case basis:

> ...it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. ... We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That, however, is a reason to decide each case on its facts, as we did in *Schmerber,* not to accept the "considerable overgeneralization" that a *per se* rule would reflect.

Missouri v. McNeely, 133 S. Ct. 1552, 1561, 185 L. Ed. 2d 696 (2013)(internal citations omitted). Ultimately, the Court ruled that:

> [i]n those drunk driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment *mandates* that they do so.

Id. With this ruling, absent a showing of actual exigent circumstances, motorists now possess a recognized 4th Amendment protection against warrantless blood draws.

Moving to the question of exigency, the *McNeely* Court referred to the "special facts" confronting the officer in *Schmerber v. California* where the Court had previously found exigent circumstances to exist. *Missouri v. McNeely*, 133 S. Ct. 1552, 1560, 185 L. Ed. 2d 696 (2013)(citing *Schmerber v. California*, 384 U.S. 757, 771, 86 S. Ct. 1826, 1836, 16 L. Ed. 2d 908 (1966)) In *Schmerber* we had a single officer, in the 1960s, investigating an accident while also charged with transporting an injured suspect to the hospital. *Missouri v. McNeely*, 133 S. Ct. 1552, 1557, 185 L. Ed. 2d 696 (2013) Further, the Court noted that at the time, there did not exist the technological advances now present, nor even the procedure in place, to procure warrants telephonically. *Missouri v. McNeely*, 133 S. Ct. 1552, 1562, 185 L. Ed. 2d 696 (2013) Given those "special facts" and under the circumstances as they existed in that day and age, "there was no time to seek out a magistrate and secure a warrant. *Schmerber*, 384 at 771 That simply was not the case here. Exigent circumstances did not exist in this case and thus the arresting officer should have attempted to procure a warrant.

A search conducted by law enforcement officers without a warrant is per se unreasonable unless the State proves it fell within one of the narrowly drawn exceptions to the warrant requirement. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *State v. Dominguez,* 137 Idaho 681, 683, 52 P.3d 325, 327 (Ct.App.2002) A search conducted with consent that was voluntarily given is one such exception. *Schneckloth,* 412 U.S. at 219, 93 S.Ct. 2041; *Dominguez,* 137 Idaho at 683, 52 P.3d at 327 The State has the burden of

proving, by a preponderance of the evidence, that the consent was voluntary rather than the result of duress or coercion, direct or implied. *Schneckloth,* 412 U.S. at 221, 93 S.Ct. 2041; *State v. Hansen,* 138 Idaho 791, 796, 69 P.3d 1052, 1057 (2003); *State v. Fleenor,* 133 Idaho 552, 554, 989 P.2d 784, 786 (Ct.App.1999); *Dominguez,* 137 Idaho at 683, 52 P.3d at 327 A voluntary decision is one that is "the product of an essentially free and unconstrained choice by its maker." *Schneckloth,* 412 U.S. at 225, 93 S.Ct. 2041. *See also, Culombe v. Connecticut,* 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961)

In the instance case the facts demonstrate that the police conducted a warrantless blood draw after Mr. Arrotta refused the blood draw. (Tr. p. 112, Ls. 1-6) The officer pursuant to department policy took a blood draw over the defendant's objection. (Tr. p. 113, Ls. 3-8)

Mr. Derek Arrotta was forced to allow the police to draw blood without a search warrant. Suppression of the warrantless blood draw is the proper remedy and the defense seeks to have the appellate court affirm the lower court's decision.

B. A defendant arrested for driving under the influence may revoke his implied consent under I.C. 18-8004.

To establish consent the state has the burden of demonstrating consent by a preponderance of the evidence. *State v. Kilby*, 130 Idaho 747, 749, 947 P.2d 420, 422 (Ct. App. 1997) The state must show the consent was not the result of duress or coercion, either direct or implied. *Scknecklоth v. Bustamonte*, 412 U.S. 218, 248, 93 S. Ct. 2041, 2058, 36 L.Ed 854, 875 (1973); *State v. Whiteley*, 124 Idaho 261, 264, 858 P.2d 800, 803 (Ct. App. 1993) The voluntariness of an individual's consent is evaluated in light of all the circumstances. *Whiteley*,

124 Idaho at 264, 858 P.2d at 803 Whether consent was granted voluntarily, or was a product of coercion, is a question of fact to be determined by all surrounding circumstances. *State v. Hansen*, 138 Idaho 791, 796, 69 P.3d 1052, 1057 (2003)

The evidence demonstrates the refusal of both the breath and blood test. The evidence here demonstrates coercion by both direct and implied threats. The argument of consent must fail under the facts of this case. The state has not demonstrated an exigency to justify the warrantless blood draw and *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013) requires suppression of the blood draw. The State of Idaho does not recognize a good faith exception to the warrant requirement. *State v. Koivu*, 152 Idaho 511, 272 P.3d 483 (2012)

Article I § 17 of the Idaho State Constitution grants greater protection than the Fourth Amendment of the United States Constitution. Article I § 17 provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizure shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized." The Idaho Supreme Court has found that this provision provides Idaho citizens greater protection from illegal searches.

The Idaho Supreme Court has found that Article I § 17 provides greater protection from the use of illegally seized evidence. *State v. Arrequi*, 44 Idaho 43, 254 P. 788 (1927); *State v. Rauch*, 99 Idaho 586 P.2d 671 (1978) The court similarly held that Article I § 17 granted greater protection to Idaho citizens and held the Leon good faith exception was contrary to Article I § 17. *State v. Koivu*, 152 Idaho 511, 516-518, 272 P.3d 483 (2012)

Article I § 17 provides the same type of protection when government seeks to force a criminal defendant to provide a blood sample. Article I § 17 assures that the person is protected absent warrants "particularly describing the place to be searched and the person or thing to be seized". Article I § 17 does not allow for searches absent particular facts related to any particular person, a per se search, therefore violates Article I § 17. In applying Article I § 17 the Idaho Supreme Court should not allow a per se exception to the warrant requirement in a DUI case. It is important to note that the court in *State v. Diaz* did not consider whether Article I § 17 grants greater protection because the argument was not made before the District Court. *State v. Diaz*, 144 Idaho 300, 303, 160 P.3d 739, 742 (2007) In light of the courts holding in *State v. Koivu*, 152 Idaho 511, 519, 272 P.2d 483, 491 (2012) holding there is greater protection under Article I § 17 by not extending Leon good faith exception under Article I § 17. This court should protect Idaho citizens from warrantless searches after they refuse the test and revoke consent where there are not particular facts justifying the searches as required by Article I § 17. Absent a search warrant Article I § 17 requires suppression of the blood draw.

C. The State of Idaho, after *Missouri v. McNeely*, may not condition the privilege of driving upon an individual's "Implied Consent" to a warrantless blood draw.

Judge John R. Stegner in his opinion articulated that: "Neither the legislature nor the courts of Idaho have the authority to suspend the Fourth Amendment and Article I § 17 by imposing irrevocable implied consent in criminal cases. To acknowledge such power would essentially render our constitution meaningless. The legislature (or the courts) could just as easily imply irrevocable consent to a warrantless search of a car, simply as a prerequisite to drive on a

public road. Or they could imply irrevocable consent to religious instruction at schools because parents enrolled their children in the public educational system. The irrevocable implied consent mechanism could be used to circumvent virtually all constitutional protection." (R. 117-118) Here the court was articulating the unconstitutional conditions doctrine.

The unconstitutional conditions doctrine prohibits the government from conditioning the grant of a privilege upon the waiver of a constitutional right. The U.S. Supreme Court set forth the unconstitutional conditions doctrine in *Frost v. R.R. Comm'n of State of Cal.*:

> [i]t would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But *the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.*

Frost v. R.R. Comm'n of State of Cal., 271 U.S. 583, 593-94, 46 S. Ct. 605, 607, 70 L. Ed. 1101 (1926)(emphasis ours) The doctrine has been applied in a number of jurisdictions, including Arizona and Georgia, to the granting of the privilege to drive. Those courts dealing with the issue have all held that the doctrine prevents the conditioning of the privilege to drive upon the waiver of one's Fourth amendment rights. As it is now clear, following *McNeely*, that motorists have a Fourth Amendment right to be free from warrantless blood draws, absent a true showing

of exigent circumstances, the state is not free to condition the granting of the privilege to drive upon a citizen's waiver of that right. In other words, consent may not be "implied" with respect to warrantless blood draws.

Idaho's implied consent law purports to condition the privilege to drive upon one giving their implied consent to a warrantless blood draw upon law enforcement's suspicion of DUI. Idaho's Implied consent Statute, I.C. § 18-8002 provides in part:

> (1) Any person who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for concentration of alcohol as defined in section 18-8004, Idaho Code, and to have given his consent to evidentiary testing for the presence of drugs or other intoxicating substances, provided that such testing is administered at the request of a peace officer having reasonable grounds to believe that person has been driving or in actual physical control of a motor vehicle in violation of the provisions of section 18-8004, Idaho Code, or section 18-8006, Idaho Code.

I.C. § 18-8002(1) Defendant recognizes that several Idaho courts, prior to *McNeely*, have held that a driver was deemed to have given his "implied" consent to a warrantless blood draw merely by driving upon the roadways of the state:

> [u]nder Idaho's implied consent statute, I.C. § 18–8002(1), anyone driving on Idaho roads is deemed to have impliedly consented to evidentiary testing for the presence of alcohol or drugs when a police officer has reasonable cause to believe the person was driving under the influence. In other words, "[b]y virtue of this statute, 'anyone who accepts the privilege of operating a motor vehicle upon Idaho's highways has consented in advance to submit to a BAC test.' " *Rodriguez,* 128 Idaho at 523, 915 P.2d at 1381 (quoting *Matter of McNeely,* 119 Idaho 182, 187, 804 P.2d 911, 916 (Ct.App.1990)). *See also Diaz,* 144 Idaho 300, 160 P.3d 739. Implied consent to evidentiary testing is not limited to a breathalyzer test, but may also include testing the suspect's blood or urine. I.C. § 18–8002(9)

State v. DeWitt, 145 Idaho 709, 712-13, 184 P.3d 215, 218-19 (Ct. App. 2008). However, the Defendant would argue that such a conditional grant of the privilege to drive was not considered to afoul of the unconstitutional conditions doctrine due to the fact that under pre-McNeely jurisprudence it was believed that an individual held no constitutional right to be free from warrantless blood draws. *See, State v. Bock*, 80 Idaho 296, 306, 328 P.2d 1065, 1071 (1958); see also, *State v. Curtis*, 106 Idaho 483, 489, 680 P.2d 1383, 1389 (Ct. App. 1984) As the *McNeely* decision has changed the constitutional landscape in this regard, and it is settled that motorists do in fact have a protected Fourth Amendment right to be free from warrantless blood draws, the State is prohibited from conditioning the granting of the privilege to drive upon a waiver of that right.

Due to the recency of the *McNeely* decision, no court holding precedential authority has ruled on the constitutionality of states implied consent statutes with respect to compelled blood draws. However, as stated infra, a number of courts have dealt with the issue of statutorily implying consent to warrantless blood draws where the Fourth Amendment would otherwise prohibit such a search, e.g. where probable cause was lacking to suspect the motorist of DUI. In each such case those Courts held that the unconstitutional conditions doctrine prohibited the legislature from conditioning the grant of the privilege to drive upon the waiver of the protections of the Fourth Amendment. In other words, those courts held that the legislature could not circumvent the Fourth Amendment by "implying" consent to an otherwise unlawful search. *State v. Quinn*, 218 Ariz. 66, 72-73, 178 P.3d 1190, 1196-97 (Ct. App. 2008), *Cooper v.*

State, 277 Ga. 282, 289-91, 587 S.E.2d 605, 611-12 (2003), *Hannoy v. State*, 789 N.E.2d 977, 986-87 *on reh'g*, 793 N.E.2d 1109 (Ind. Ct. App. 2003)

In *State v. Quinn*, the Arizona Court of Appeals ruled on the constitutionality of a section of the Arizona implied consent law which purported to "imply" a motorists' consent to warrantless blood draws *absent* probable cause to believe the motorist to have been DUI. Specifically, the statute at issue sought to imply consent in every instance where a motorist was involved in an accident which resulted in death or serious injury to another. *State v. Quinn*, 218 Ariz. 66, 69, 178 P.3d 1190, 1193 (Ct. App. 2008) The defendant, Quinn, was involved in such an accident. It was undisputed that law enforcement did not possess probable cause to believe Quinn to be DUI. Nevertheless, acting under authority of Arizona's implied consent statute, law enforcement extracted blood without a warrant and absent actual consent. The State of Arizona argued that consent was implied by the operation of statute:

> [t]he State further asserts that, even assuming the statute does not fit within the special needs exception, Quinn consented to the search because § 28–673 specifies that all those who drive a vehicle on Arizona roads consent to such a search. In support it relies on *Tornabene v. Bonine ex rel. Ariz. Highway Dep't,* 203 Ariz. 326, 334, ¶ 19, 54 P.3d 355, 363 (App.2002), which held, "driving in Arizona is not a right, but a privilege, subject to legislative mandate."

State v. Quinn, 218 Ariz. 66, 72, 178 P.3d 1190, 1196 (Ct. App. 2008) In rejecting the state's argument, the Court noted that the Fourth Amendment required probable cause for DUI prior to the extraction of blood:

> [n]ormally, because any forced extraction of blood by the State invades one's expectation of privacy in bodily integrity, the intrusion is subject to the requirements of the Fourth Amendment. *State v. Jones,* 203 Ariz. 1, 9, ¶ 27,

> 49 P.3d 273, 281 (2002); *see also Schmerber v. California,* 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). As *Schmerber* explains, the State's unconsented-to search of a person's blood requires probable cause to believe that the search will reveal the presence of controlled or intoxicating substances. 384 U.S. at 768–71, 86 S.Ct. 1826. The *Schmerber* Court stated that:
>
> > [t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any [ ] intrusions [into a person's blood] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear....
>
> *Id.* at 769–70, 86 S.Ct. 1826.

State v. Quinn, 218 Ariz. 66, 68-69, 178 P.3d 1190, 1192-93 (Ct. App. 2008) Applying the unconstitutional conditions doctrine to the statute, the Court ruled the statute an unconstitutional exercise of legislative authority:

> ...states may not condition the grant of a privilege on the forfeiture of a constitutional right..."a statute cannot circumvent a firmly established constitutional right."
> ...
> As *Schmerber* makes clear, Quinn's constitutional right is to be free of any searches of her blood "[i] n the absence of a clear indication" that her blood would demonstrate the presence of alcohol or other controlled substances. Thus, within the limits of the Constitution, the State cannot condition Quinn's driving privilege on the surrender of her constitutional right not to have evidence admitted against her in a criminal prosecution that was taken from her without a consent and in the absence of probable cause.

State v. Quinn, 218 Ariz. 66, 73, 178 P.3d 1190, 1197 (Ct. App. 2008).

In *Cooper v. State*, 277 Ga. 282, 587 S.E.2d 605 (2003), the Georgia Supreme Court dealt with a statute nearly identical to that in Quinn:

> [u]nder OCGA § 40-5-55(a), because Cooper was involved in an accident resulting in "serious injuries," as defined in subsection (c) of the statute, he was deemed by operation of law to have given consent to the administered blood test to determine if there was the presence of alcohol or any other drug.

Cooper v. State, 277 Ga. 282, 285, 587 S.E.2d 605, 608 (2003)(citations omitted). The Georgia Court noted:

> [t]he high courts of several other states have grappled with the constitutionality of provisions allowing the chemical testing of bodily substances without probable cause or valid consent, and based solely on a serious traffic mishap. These courts have uniformly rejected provisions which obviate the finding of probable cause. See *McDuff v. State,* 763 So.2d 850 (Miss.2000); *Blank v. State,* 3 P.3d 359 (Alaska 2000); *King v. Ryan,* 153 Ill.2d 449, 180 Ill.Dec. 260, 607 N.E.2d 154 (1992); *Commonwealth v. Kohl,* 532 Pa. 152, 615 A.2d 308 (Pa.1992). Compare *State v. Roche,* 681 A.2d 472 (Maine 1996).

Cooper v. State, 277 Ga. 282, 287-88, 587 S.E.2d 605, 609-10 (2003). The Court then held, as did the Court in *Quinn* that an implied consent statute could not act to imply consent where to do so would require the waiver of a motorist's Fourth Amendment right to be free from unreasonable search and seizure:

> [t]his Court's use of the term "suspect" in regard to the Implied Consent Statute brings into sharp focus the flaw in that portion of the statute compelling chemical testing of the person merely by virtue of involvement in a traffic accident resulting in serious injury or fatality. There is no requirement of individualized suspicion, much less probable cause, that would render the person "suspect" of impaired driving.
>
> ...
>
> Thus, to the extent that OCGA § 40-5-55(a) requires chemical testing of the operator of a motor vehicle involved in a traffic accident resulting in serious injuries or fatalities regardless of any determination of probable cause, it authorizes unreasonable searches and seizures in violation of the State and Federal Constitutions.

Cooper v. State, 277 Ga. 282, 290, 587 S.E.2d 605, 611-12 (2003) In so holding the Court cited the following language from the Indiana Court of Appeals in *Hannoy v. State*, 789 N.E.2d 977, 987 (Ind.App.2003):

> [t]he legislature cannot, however, abrogate a person's Fourth Amendment right to be free from unreasonable searches and seizures, as defined by the Supreme Court. *To hold that the legislature could nonetheless pass laws stating that a person "impliedly" consents to searches under certain circumstances where a search would otherwise be unlawful would be to condone an unconstitutional bypassing of the Fourth Amendment.*

Cooper v. State, 277 Ga. 282, 290, 587 S.E.2d 605, 611-12 (2003) The Court concluded by stating:

> "The requirements of the Fourth Amendment cannot be lowered based upon the heinousness of the particular crime police are investigating." *Hannoy v. State,* supra at 988. The illegally-obtained test results were not admissible against Cooper at trial, and the trial court erred in denying Cooper's motion to suppress such evidence.

Cooper v. State, 277 Ga. 282, 291, 587 S.E.2d 605, 613 (2003)

In *Hannoy v. State*, 789 N.E.2d 977, *on reh'g*, 793 N.E.2d 1109 (Ind. Ct. App. 2003), the Indiana Court of Appeals addressed the constitutionality of the Marion County Sheriff Department's policy of obtaining blood samples without probable cause from drivers involved in accidents resulting in serious bodily injury or death. *Id. Hannoy* was involved in an accident involving the death of another individual and, as in *Quinn* and *Cooper*, law enforcement lacked probable cause to believe Hannoy to be DUI. Rejecting a "special needs" argument as well as an argument that Indiana's implied consent statute authorized the blood draw, the Court found the warrantless blood draw unconstitutional :

> [t]he requirements of the Fourth Amendment cannot be lowered based upon the heinousness of the particular crime police are investigating. We are well aware of the pain and suffering inflicted by intoxicated drivers on our roads. Nevertheless, we do not perceive that our opinion today, which will apparently require alterations in the standard policy of at least one major Indiana law enforcement agency, will unduly burden law enforcement officers in collecting blood alcohol readings in cases such as this...To the extent our holding today may lead to the loss of blood alcohol or illicit drug content evidence in some cases, we heed the words of the Supreme Court in *Schmerber* that the Fourth Amendment imposes limitations on the ability of police to investigate criminal activity and sometimes requires police to "suffer the risk" that certain evidence thereby will not be obtained. 384 U.S. at 770, 86 S.Ct. at 1835.
>
> The withdrawal of Hannoy's blood was not obtained pursuant to the guidelines in the implied consent statutes and cannot be justified as being drawn in accordance with those statutes. The withdrawal was not accomplished in accordance with the Fourth Amendment and *Schmerber* because there was no probable cause to believe Hannoy was intoxicated at the time his blood was drawn and no actual, knowing, and voluntary consent to the withdrawal. The "special needs" exception to the probable cause requirement cannot be applied in the context of a criminal investigation by law enforcement. Therefore, the blood alcohol content evidence obtained from the blood draw performed at the request of law enforcement was illegally obtained and should not have been admitted into evidence by the trial court.

Hannoy, at 987-89 *on reh'g*, 793 N.E.2d 1109 (Ind. Ct. App. 2003)

The *McNeely* Court gave the clear mandate that "[i]n those drunk driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment *mandates* that they do so." *Missouri v. McNeely*, 133 S. Ct. 1552, 1561, 185 L. Ed. 2d 696 (2013) Thus, after *McNeely*, a motorist arrested on suspicion of DUI now clearly has a constitutional right to be free from warrantless intrusions into their body absent the existence of either a true showing of exigent circumstances cause or actual valid consent. As such, the unconstitutional conditions

doctrine now prohibits the legislature from bypassing constitutional protections of the Fourth Amendment and implying, or otherwise requiring, consent upon the act of accepting the privilege to drive. Thus, the *Diaz* decision cited by the State is inapplicable to this instant case. Consent cannot be implied when we are dealing with the prospect of "consenting away" a valid Fourth Amendment right. As Judge John R. Stegner articulated: "The irrevocable implied consent mechanism could be used to circumvent virtually all constitutional protections." The unconstitutional conditions doctrine mandates the courts upholding of the District Court's decision suppressing the warrantless blood draw.

I. CONCLUSION

The defendant in a driving under the influence case should not be held to have consented to a warrantless blood draw after refusing the breath test and blood draw. The Fourth Amendment to the U.S. Constitution and Article I § 17 of the Idaho State Constitution require a warrant before conducting forced blood draws. The defense respectfully seeks to have the District Court's decision upheld.

Respectfully submitted this 3 day of April, 2014

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4th day of April, 2014, I placed the original bound brief, six bound copies, and one unbound, unstapled copy of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

Idaho Supreme Court
P.O. Box 83720
Boise, ID 83720 0101

I HEREBY CERTIFY that on this 4th day of April, 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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